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Supreme Court of the United States

October Term, 1948

Number 891

ALVIN GROVER CONNER,
Petitioner in Certiorari

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

WESLEY R. ASINOF
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Atlanta 3, Georgia

IN THE

Supreme Court of the United States

October Term, 1963

Number

ALVIN GROVER CONNER,

Petitioner in Certiorari

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes Alvin Grover Conner, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted in the District Court for the Northern District of Georgia, Atlanta Division, for the offense of conspiracy to violate the Internal Revenue

Laws relating to manufacture, possession, transportation and distribution of distilled spirits without payment of the federal tax. The indictment named the Appellant as the sole defendant, but alleged the names of fourteen other persons as co-conspirators. Appellant entered a plea of not guilty, and a trial was had resulting in a verdict finding him guilty and the Court imposed a sentence of two years in the custody of the Attorney General.

Inasmuch as no question is being raised in this petition as to the sufficiency of the evidence (it being sufficient as a matter of law if believed by the jury) the statement of facts will not include the details of the evidence.

During the trial of the case, and while government witness William Daniel, an alleged co-conspirator, was testifying on redirect examination by Government counsel, the following colloquy took place: — (R. 109)

> "Q. Now, Mr. Howard also asked you, asked you did you know Grover Conner, Alvin Conner while you were working with Billy Huddleston, when you were first working with him. Did you know anything about him before you met him?
>
> A. Well, I had heard in card games and conversations.
>
> Q. No, I'm talking about from people you were dealing with, Mr. Huddleston and Mr. Eassy, had you all had any conversations concerning Mr. Conner?
>
> A. Oh, I had took it that he was in the liquor business from the conversations."

Whereupon counsel for the Petitioner then made a motion for a mistrial upon the ground that the question

and answer tended to place the defendant's character in issue without his having first done so, and that it was so prejudicial as to require the grant of a mistrial.

After a further colloquy between the Court and counsel, the motion for mistrial was overruled, and the Court instructed the jury to disregard the answer as being improper.

The United States Court of Appeals for the Fifth Circuit held that the trial judge promptly instructed the jury to disregard the answer, and therefore cured any error and that if any error occurred, it was harmless.

A petition for rehearing was filed and denied by the Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered September 19, 1963. The petition for rehearing was denied February 6, 1964. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule 11 of the Rules of Practice and Procedure.

(b) This petition for certiorari is being filed in this case within 30 days from the date of the judgment denying the petition for rehearing.

(c) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

The United States Court of Appeals for the Fifth

Circuit has decided an important question of federal law involving fairness in criminal trials, and the decisions upon the subject are not uniform, and should be settled by this Court.

THE QUESTION PRESENTED

1. The Court committed reversible error in failing and refusing to declare a mistrial on motion of the Appellant, because the answer by the witness placed the character and reputation of the defendant in evidence without the accused first having done so.

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building
Atlanta 3, Georgia

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19874

ALVIN GROVER CONNER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(September 19, 1963.)

Before CAMERON, and WISDOM, Circuit Judges, and DeVANE, District Judge.

CAMERON, Circuit Judge: The sole question presented by this appeal from a conviction of conspiring to violate the liquor taxing laws is whether the court below committed reversible error in refusing to grant a mistrial "because [an] answer by [a] witness placed the character and reputation of the defendant in evidence without the accused first having done so." No

question is raised as to the sufficiency of the evidence to support the verdict of guilty rendered by the jury.

In answer to the prosecutor's question relating to whether the witness knew anything about the defendant before he met him, the witness, a co-conspirator but not co-defendant, answered:

> "Oh, I had took it he was in the liquor business from the conversations."

The trial judge promptly instructed the jury to disregard this answer.

It is the general rule that an erroneous admission of evidence is cured by excluding the evidence from the consideration of the jury and directing the jurors to disregard it. *Fahning v. United States*, 5 Cir. 1962, 299 F.2d 579; *Helton v. United States*, 5 Cir., 1955, 221 F.2d 338; *United States v. Simone, et al*, 2 Cir., 1953, 205 F.2d 480; and *Mora v. United States*, 5 Cir., 1951, 190 F.2d 749.

Assuming here that the statement proffered was improper, it is plain to us that the substantial rights of the defendant were not affected. His guilt is clear and error, if any occurred, was harmless. Rule 52(a), F.R.Cr. P., 18 U.S.C.A.

The judgment appealed from is AFFIRMED.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19,874

D. C. Docket No. 23,047 Crim.

ALVIN GROVER CONNER,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Cameron and Wisdom, Circuit Judges, and DeVane, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 19, 1963

Issued as Mandate.

[557]

(Filed 6th day of February, 1964. Eugenia S. Campbell, Dep. Clerk of the United States Court of Appeals.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19874

ALVIN GROVER CONNER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(Feb. 6, 1964)

ON PETITION FOR REHEARING

Before CAMERON and WISDOM, Circuit Judges, and DE VANE, District Judge

PER CURIAM

IT IS ORDERED that the appellant's petition for rehearing be, and it is hereby DENIED.

[Judge DeVane participated in the hearing of this case, but died before this opinion was written.]

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 891

ALVIN GROVER CONNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 322 F. 2d 647.

JURISDICTION

The judgment of the court of appeals was entered September 19, 1963. A petition for rehearing was denied February 6, 1964. The petition for a writ of certiorari was filed March 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error not to grant a mistrial after an answer by a witness that, before he met petitioner, he assumed from conversations with others that petitioner was in the liquor business—an answer which the judge instructed the jury to disregard.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Georgia of conspiracy to violate the liquor laws and was sentenced to imprisonment for two years. The conviction was affirmed on appeal.

The sufficiency of the evidence is not questioned. *Inter alia*, two witnesses, Robert Eassey and William Daniel, testified to participating with petitioner and Huddleston in the manufacture and transportation of non-taxpaid liquor. Eassey testified that he worked with petitioner at a still in Douglas County in September, 1959 (R. 44-46) and with petitioner, Huddleston and Daniel at another still in Fulton County after Christmas, 1959 (R. 47-48); that he stored liquor for petitioner in early 1960 (R. 48, 54-55); and that he transported 1500-1600 gallons of liquor for petitioner from the beginning of 1960 to March 5, when he wrecked a car he was using and was told that it was stolen (R. 49-54). Daniel testified that he met petitioner in November, 1959 (R. 73), transported jars and sugar to the still in Fulton County in late December, 1959 (R. 75-76), and transported

liquor from the still in early 1960 (R. 79-81). He further testified that he had been at the still site in Douglas County only once, after it had been raided (R. 92-93), and, on cross-examination, that petitioner was not with him at that time (R. 103). On redirect examination, Daniel was asked whether he knew anything about petitioner before he had met him while working with Huddleston, and whether he had any conversation with Huddleston and Eassey concerning petitioner. Daniel answered that he "had took it" that petitioner was in the liquor business from the conversation (R. 110). Petitioner's attorney moved for a mistrial. In argument outside the presence of the jury, government counsel stated that he meant the question to relate to the period just before Daniel met petitioner (in November, 1959), while the Douglas County still was in operation (R. 114-116). The court believed that the question and answer could not be so understood (R. 117). It held that the answer to the question did not warrant a mistrial (R. 117) but directed the jury to disregard it (R. 118).

ARGUMENT

There is no merit in petitioner's contention that he should have had a mistrial because the witness Daniel said that before he met petitioner, he understood from conversations with others that petitioner was in the liquor business. Not only must it be assumed that the jury obeyed the judge's instructions to disregard the evidence (*Opper* v. *United States*, 348 U.S. 84, 95), but the statement itself was un-

important. Even if the answer could be construed as referring to petitioner's participation in the liquor business prior to the period charged in the indictment, that would add little to the overwhelming proof of guilt.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1964

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